employment. (emphasis added) In *Gutierrez De Martinez v. D.E.A.* 111 F.3d 1142, 1155, we review the district courts discovery decision for abuse of discretion (holding that "this district court did not abuse its discretion in holding an evidentiary hearing on scope-of-employment issue") (noting in an action under the Westfall Act, that pretrial discovery decisions "are matters within [the trial courts'] discretion"). Under this standard we affirm the district courts' refusal to allow additional discovery and an evidentiary hearing. *Goldstein* 364 F.3d 205, 220. The 4th Circuit states, contrary to Goldstein's assertions, that he has no right to discovery on the certification issue, the assessment of whether discovery is appropriate on such an issue is within the sound discretion of the district court and any discovery that is authorized should be narrow and circumscribed. As we have explained, "the district court may allow [in its discretion] limited discovery or conduct an evidentiary hearing, but should not do so if the certification, the pleadings, the affidavits and any supporting documentary evidence do not reveal an issue of material fact". *Gutierrez v. D.E.A.* at 1155 In *Goldstein* there is no reference whatsoever to

*Gutierrez De Martinez v. Lamagno*, 115 S.Ct. 2227 (1995). In *Maron* the 4th Circuit found: "we find Maron's arguments unpersuasive, and we affirm all of the Lower Court's conclusions". All the cases cited in *Maron* at 322 are not in conformance with, *Gutierrez De Martinez v. Lamagno*, 115 S.Ct. 2227 (1995).

LOWER COURT CASES DECIDED IN THE 4TH CIRCUIT

*Brittingham v. U.S.*972 F Supp. 1014 (ED. (Va) 1997)

*Chin v. Wilhelm* 291 F. Supp. 2d 400 (D. Md. 2003)

*Curtis v. Praeht* 202 F. Supp. 2d 406 (D. Md. 2002)

*Deane v. Light* 970 F. Supp. 465 (E.D. (Va) 1997)

*Lee v. U.S.* 171 F. Supp. 2d 566 (M.D. (NC) 2001)

*Webb v. U.S.* 24 F. Supp. 2d 608 (W.D. (Va) 1998)

*Wilson V. Jones* 902 F. Supp. 673 (E.D. (Va) 1995)

All except two of the cases were affirmed and dismissed. The two cases that were not dismissed

were: 1) *Deane v. Light* in which the government employee did not engage in the conduct alleged. 2) *Wilson v. Jones* in which the court allowed Plaintiff twenty days to submit verified evidence that Defendant was acting outside the scope of his employment.

The above cited cases should provide the Supreme Court with what it needs to reverse once again the 4th Circuit. The Supreme Court needs to make it clear to the 4th Circuit that it has had the last bite of the apple on this issue.

## CONCLUSION

The 4th Circuit Court of Appeals has ignored the teachings of *Gutierrez De Martinez v. Lamagno*. It has obscured and in a sense overruled *Gutierrez De Martinez v. Lamagno*. The decisions the 4th Circuit made in *Gutierrez De Martinez v. Drug Enforcement Admin*. 111 F3d 1148 (4th Cir. [Va] 1997) have rewritten and ignored *Gutierrez De Martinez v. Lamagno*. THE SUPREME COURT HAS COMPELLING REASONS TO GRANT WRIT OF CERTIORARI IN THIS CASE.

App. A

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| MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR LIMITED AND REASONABLE DISCOVERY | App. 15 |
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App. 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 04-2003

---

H. LEON MERRITT,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

STEVEN MEYERS; KENNETH DORNER,

Defendants.

---

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-04-442-1)

---

Submitted: February 25, 2005 Decided: March 16, 2005

---

Before WILKINSON, MOTZ, and KING, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Bernard R. Corbett, LAW OFFICE OF BERNARD R. CORBETT, Alexandria, Virginia, for Appellant. Paul J. McNulty, United States Attorney,

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Dennis C. Barghaan, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

H. Leon Merritt appeals the district courts orders dismissing his tort case and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See *Merritt v. United States*, No. CA-04-442-1 (E.D.Va. filed June 16 and entered June 18, 2004; filed July 16 and entered July 19, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

App. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---|---|---|
| H. LEON MERRITT, | ] | |
| | ] | |
| Plaintiff, | ] | |
| | ] | |
| v. | ] | Case No. 1:04cv442 |
| | ] | |
| | ] | |
| STEVEN MEYERS, et al | ] | |
| | ] | |
| Defendants. | ] | |

**JUDGMENT**

Pursuant to this Court's order dated June 14, 2004, wherein the Court granted the United States' Motion to Dismiss, the Court hereby

ORDERS the Clerk to enter JUDGMENT in favor of the Defendants Steven Meyers, Kenneth Dorner, and the United States of America and against Plaintiff H. Leon Merritt, pursuant to Rule 58(a) of the

Federal Rules of Civil Procedure. This case is hereby DISMISSED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of June, 2004.

Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

06/16/04

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---|---|---|
| H. LEON MERRITT, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. 1:04cv442 |
| | ) | |
| STEVEN MEYERS, et al | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER**

THIS MATTER is before the Court on Plaintiff Merritt's Motion for Limited and Reasonable Discovery and the United States' Motion to Dismiss. For the reasons stated in open court on June 4, 2004, it is hereby

ORDERED that Plaintiff's Motion for Limited and Reasonable Discovery is DENIED. It is further

ORDERED that the United States' Motion to Dismiss is GRANTED.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 14th day of June, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/14/04

IN THE UNITED STATED DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action No. 04-442-A |
| | : | |
| UNITED STATES OF AMERICA | : | |
| | : | |
| Defendant. | : | |

AFFIDAVIT OF H. LEON MERRITT

I am over the age of twenty-one and competent to testify in this matter. The statements I made herein are based on my personal knowledge.

1. On or about April 1, 2003, I saw Steven Meyers walk into my office which at that time I shared with Ms. Nathanya Furguson.

2. Mr. Meyers walked over to my desk, picked up pictures of my grandchildren, then tossed them on my desk.

3. Mr. Meyers loudly proclaimed to me "What is this, more of your child pornography?"

4. Mr. Meyers was referring to pictures of my granddaughters enjoying a birthday party.

5. Shortly before Mr. Meyers came into my office, I was showing the pictures of my granddaughters to Ms. Furguson. The pictures were of my fully cloth grandchildren, they did not contain any nudity of obscene material. The pictures were of my happy, beautiful grandchildren in a family setting.

6. I was appalled at Mr. Meyers saying what he said so loudly that not only Ms. Furguson heard him, but anyone walking thru the hallway could have heard him.

7. The loud comments by Mr. Meyers could be very easily heard by numerous contract employees, and USPTO employees that walked by the office shared by Ms. Furguson and me.

8. I am a proud grandfather. I have always enjoyed sharing news and pictures about my lovely granddaughters with my co-workers and they share theirs with me.

9. Not wishing to be subjected to such distasteful comments by Mr. Meyers again, I removed all pictures of my grandchildren from my work area.

10. At no time did Mr. Meyers ever say anything in my presence that remotely sounded like "Remove potentially offensive items from this work place" or any words that conveyed such a message in anyway.

I DO SOLEMNLY SWEAR UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDG INFORMATION AND BELIEF.

_____

H. Leon Merritt

*State of Maryland :*

*City of Annapolis : To Wit,*

*Subscribed and sworn to before me this 7th day of May, 2004.*

*Susan M. Blake*

*Notary Public*

*My Commission Expires: August 9, 2006*

*Commonwealth of Virginia :*

*City of Alexandria : To Wit,*

*Subscribed and sworn to before me this 5th day of May, 2004.*

_____

*Notary Public*

App. 12

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action No. 04-442-A |
| | : | |
| UNITED STATES OF AMERICA | : | |
| | : | |
| Defendant. | : | |

AFFIDAVIT OF NATHANYA FERGUSON

I am over the age of twenty-one and competent to testify in this matter. The statements I made herein are based on my personal knowledge.

1. On or about April 1, 2003, I saw Steven Meyers walk into the office which at that time I shared with Mr. Hubert Merritt.

2. Mr. Meyers walked over to Mr. Merritt's desk and put his hand over Mr. Merritt's desk.

3. Mr. Meyers had his back to me. I was unable to determine whether he picked up any pictures from Mr. Merritt's desk.

4. However, Mr. Meyers loudly proclaimed to Mr. Merritt, "Are you looking at child pornography?"

5. Mr. Meyers was referring to pictures of Mr. Merritt's granddaughters enjoying a birthday party.

6. I know this because Mr. Merritt, shortly before Mr. Meyers came into the office, was showing me the pictures of his granddaughters. The pictures were of fully cloth children, they did not contain any nudity of obscene material. The pictures were of happy, beautiful children in a family setting.

7. I stated to Mr. Merritt, that in addition to being saddened by the comments made by Mr. Meyer, I was uncomfortable and in disbelief that Mr. Meyers could make such an inappropriate statement in a workplace setting where other contract employees or USPTO employees could hear.

8. The loud comments by Mr. Meyers could be very easily heard by numerous contract employees, and USPTO employees that walked by the office shared by Mr. Merritt and me.

9. I characterize Mr. Merritt as a proud grandfather. Mr. Merritt has always enjoyed sharing news and pictures about his lovely granddaughters.

10. It is unfortunate that shortly after the incident with Mr. Meyers, Mr. Merritt removed all pictures of his grand-children from his work area.

11. At no time did Mr. Meyers ever say anything in my presence that remotely sounded like "Remove potentially offensive items from this work place" or any words to that effect.

I DO SOLEMNLY SWEAR UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

_____

Nathanya Ferguson

App. 15

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | ] | |
| | ] | |
| Plaintiff, | ] | |
| | ] | |
| v | ] | Civil Action No. 04-442-A |
| | ] | |
| | ] | Hon. Gerald B. Lee |
| STEVEN MEYERS | ] | |
| | ] | |
| Defendant. | ] | |

**MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR LIMITED AND REASONABLE DISCOVERY**

Plaintiff requests that this Court grant him limited and reasonable discovery for the purpose of deciding whether to contest the determination of the U.S. Attorney for this District's finding that Meyers

and Dorner were acting within the scope of their federal employment at the time of the incidents giving rise to this action.

Plaintiff wishes to discover the following:

With regard to Defendant Meyers:

1. Plaintiff wishes to discover evidence of any investigation conducted by the government prior to its determination that Meyers was acting within the scope of his federal employment at the time of the incidents giving rise to this Action.
2. Plaintiff requests that the Government disclose the job description that describes the duties of Meyers at the U.S. Patent and Trademark Office since January 1, 2003.
3. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Meyers to make a determination that Meyers was performing duties within the scope of his federal job description when he took the actions that are complained about in Count 1 of the Complaint.
4. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Meyers to make a determination

that Meyers was performing duties within the scope of his federal job description when he took the actions that are complained about in Count II of the Complaint.

With regard to Dorner:

1. Plaintiff wishes to discover evidence of any investigation conducted by the Government prior to its determination that Dorner was acting within the scope of his federal employment at the time of the incidents giving rise to this Action.
2. Plaintiff requests that the government disclose the job description that describes the duties of Dorner at the U.S. Patent and Trademark Office since January 1, 2003.
3. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Dorner to make a determination that Dorner was performing duties within the scope of his federal job description when he took the actions that are complained about in Count I of the Complaint.

With regard to Meyers and Dorner:

1. Plaintiff requests that the Government produce all documents relied on or referred to when

making its response to the above requests. This is to include, but is not limited to written or recorded statements made by Meyers or Dorner or any witnesses.

Respectfully submitted,

H. LEON MERRITT,
Plaintiff
By Counsel

LAW OFFICE OF BERNARD R. CORBETT

By: _____

Bernard R. Corbett, Esquire
VA Bar No. 023022
123 South Royal Street
Alexandria, Virginia 22314
Tel. (703) 549-4700
Fax (703) 549-5290
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | ] | |
| | ] | |
| Plaintiff, | ] | |
| | ] | |
| v. | ] | Civil Action No. 04-442-A |
| | ] | Formerly Case No. 04-215 |
| | ] | Circuit Court for Arlington |
| | ] | County, Virginia |
| STEVEN MEYERS | ] | |
| | ] | |
| Defendant. | ] | |

**CERTIFICATE OF SCOPE OF EMPLOYMENT**

I, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, pursuant to Title 28, Code of Federal Regulations, Part 15.3(2), hereby

certify that I have caused an investigation to be made into the circumstances of the incident upon which is based the plaintiff's claim against Steven Meyers and Kenneth Dorner. Based upon the results of that investigation I hereby certify that Steven Meyers and Kenneth Dorner, Defendants, were acting within the course and scope of their employment as employees of the United States of America at the time of the incident out of which the above-entitled action arose.

_____

Paul J. McNulty
United States Attorney

Dated: 4/14/04

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | ] | |
| | ] | |
| Plaintiff, | ] | |
| | ] | |
| v. | ] | Civil Action No. 04-442-A |
| | ] | Formerly Case No. 04-215 |
| | ] | Circuit Court for Arlington |
| | ] | County, Virginia |
| STEVEN MEYERS | ] | |
| | ] | |
| Defendant. | ] | |

**NOTICE OF SUBSTITUTION**

The United States, by and through its undersigned counsel, is hereby substituted as the proper party defendant for Steven Meyers and Kenneth Dorner. See 28 U.S.C.

§ 2679(d)(2). The above caption shall be used in any future court documents.

Plaintiff, H. Leon Merritt alleges defamation and other torts against defendants. Whatever actions, if any, were taken by Meyers and Dorner within the official performance of their Federal duties. The exclusive remedy for claims of damage resulting from the actions of a federal employee when acting within the course and scope of his office or employment lies in an action against the United States of American under the Federal Tort Claims Act. See 28 U.S.C. § 2671, 2679.

Upon certification by the Attorney General or his designee that the individual federal defendant was acting within the scope of his employment, the action is deemed one against the United States under the Federal Tort Claims Act. See 28 U.S.C. § 2679(d)(2). In the instant case, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, has certified that Defendants, Steven Meyers and Kenneth Dorner were acting within the scope and course of their employment at all times relevant to the Plaintiff's claims. See Defendant's Exhibit A (attached hereto). Consequently, Steven Meyers and Kenneth Dorner must be dismissed as defendants in

this action and the United States substituted as the sole defendant. 28 U.S.C.§ 2679(d)(2).

Respectfully submitted,
Paul J. McNulty
United States Attorney
By Counsel

By: _____
Jon K. Turner
Special Assistant United States Attorney
Appearing Per 28 U.S.C. § 517
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: 703-299-3700

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---|---|---|
| H. LEON MERRITT | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 04-442-A |
| | ) | Formerly Case No. 04-215 |
| | ) | Hon. Gerald B. Lee |
| STEVEN MEYERS | ) | |
| | ) | |
| Defendant. | ) | |

**NOTICE OF REMOVAL**

To: Clerk of the Circuit Court
Arlington County Circuit Court
1425 North Courthouse Road
Arlington, Virginia 22201
Bernard R. Corbett, Esq.
123 South Royal Street
Alexandria, Virginia 22314

The United States of America, by and through its undersigned attorneys, respectfully represents:

1. That it is the employer of Steven Meyers and Kenneth Dorner, Defendants in the above-captioned civil action now pending in the Circuit Court of Arlington County, Virginia at all relevant times and that no trial has yet been had therein. A copy of the Motion for Judgment was received by the Defendants and is attached hereto. This constitutes all process, pleadings, and orders received by named Defendants in this action. See 28 U.S.C. § 1446 (a).

2. The instant removal is brought pursuant to 28 U.S.C. §§ 1446, 2679. The State court action commenced against the named Defendants is predicated upon acts allegedly performed by them within the course and scope of their employment with the United States Patent and Trademark Office.

3. Plaintiff, H. Leon Merritt alleges defamation and other torts against defendants. Whatever actions, if any,

4. taken by Meyers and Dorner were taken within the official performance of their Federal duties. Therefore, the action lies solely against the United States of America as a matter of Federal law. 28 U.S.C. § 2679.

5. Attached hereto is a certification by the United States Attorney for the Eastern District of Virginia verifying that at the time of the alleged incident, Steven Meyers and Kenneth Dorner, were acting within the course and scope of their official duties.

6. A copy of this Notice of Removal is being filed with the Clerk of the State Court pursuant to Title 28 U.S.C. § 1446(d).

Respectfully submitted,
Paul J. McNulty
United States Attorney
By Counsel
By: _____
Jon K. Turner
Special Assistant United States Attorney
Appearing Per 28 U.S.C. § 517

App 27

2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: 703-299-3700

END

In The
Supreme Court of the United States:

H. Leon Merritt,
Petitioner

v. Case No. 04-1675

United States of America
Respondent.

and

Steven Meyers; Kenneth Dorner,
Respondents

## Motion for Rehearing

H. Leon Merritt respectfully moves this Court to grant a rehearing pursuant to Rule 44 of his Petition for Writ of Certiorari. This Motion is presented in good faith and not for delay. The petitioner hereby certifies the grounds are limited to intervening circumstances of substantial or controlling

**effect. Counsel for Petitioner certifies the above.**

**Respectfully submitted,**

**Bernard R. Corbett**
**Counsel for H. Leon Merritt,**
**Petitioner**